LIBRARY
SUPREME COURT U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 253

THE UNITED STATES, PETITIONER

vs.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 31, 1948
CERTIORARI GRANTED NOVEMBER 8, 1948

Supreme Court of the United States

OCTOBER TERM, 1948

No. 253

THE UNITED STATES, PETITIONER,

vs.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED AUGUST 31, 1948

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit No. 1—Memorandum dated September 25, 1941 from Bureau of Ordnance to Mr. Johnson	16	10
Exhibit No. 2—Letter dated Dec. 24, 1941 from Bureau of Ordnance to Commandant and Superintendent, U. S. Naval Gun Factory	18	11
Exhibit No. 3—Letter dated December 29, 1941 from Bureau of Supplies and Accounts	19	12
Exhibit No. 4—Letter dated February 23, 1942 from Bureau of Supplies and Accounts to Penn Foundry and Mfg. Co.	22	13
General traverse	25	14
Defendant's counterclaim	27	14
Argument and submission of case	30	16
Special findings of fact	33	16
Conclusion of law	40	22
Opinion, Madden, J.	41	22
Judgment	47	26
Proceedings after entry of judgment	49	27
Clerk's certificate (omitted in printing)	51	27
Order allowing certiorari		28

In the Court of Claims of the United States

No. 46122

PENN FOUNDRY AND MANUFACTURING CO., INC., Waynesboro, Virginia,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FILED JUNE 21, 1944

To the Honorable, the Chief Justice and Associate Justices of the United States Court of Claims:

The Claimant, PENN FOUNDRY AND MANUFACTURING COMPANY, INC., a corporation organized in the year 1911 in the State of Virginia, with main offices at Waynesboro, Virginia, states:

1. That it has been a manufacturing corporation engaged in various types of manufacturing ever since its incorporation in 1911, except for periods of time when, because of business conditions, its activities were suspended or reduced. During all of said time its main office and place of business and its manufacturing plant and machinery have been located at Waynesboro.

2. That on January 3, 1941, and prior thereto, Claimant was engaged in the operation of its said plant and machinery at Waynesboro, Virginia, and at said time and on said date of January 3, 1941 and prior thereto, had purchased and placed in its said plant all necessary machinery, equipment and facilities which enabled it to engage in the manufacture of many articles needed in the National Defense Program of the United States and particularly fitted it for the manufacture of such articles as gun mounts and related facilities and articles needed by the Defendant, the United States of America, in its Defense Program; and that on said date of January 3, 1941, and prior thereto, Claimant had determined on a policy and program of seeking and obtaining from the Defendant, the United States of America, certain contracts, when obtainable, for the manufacture of those things which its facilities enabled it to manufacture economically and with reasonable speed, and which were required by the Defendant in its Defense Program.

3. On said date of January 3, 1941, it initiated negotiations with the Defendant through one of its agencies known as the Navy Planning Board and also with the Bureau of Ordnance, for the purpose of securing from the Defendant a contract for the manufacture, at its said plant in Waynesboro, Virginia, of a number of gun mounts to be agreed upon between the Claimant and Defendant: That in order to carry forward said negotiations, and to be ready for the performance of any contract so negotiated, Claimant had procured and had on hand on said date of January 3, 1941 and continuously thereafter all necessary basic machinery, machine tools and equipment for the completion of any contract which might be obtained as a result of said negotiations, of which the said Defendant, the United States of America had full knowledge and information, not only from detailed information furnished by Claimant, but by reason of their own investigation through fully authorized agents who inspected the same. That said inspections of Plaintiff's plant and equipment were made as early as March 12, 1941 and from time to time thereafter during the periods of time herein referred to.

4. Claimant further says that following the conferences held between it and the Defendant between January 3, 1941 and April 19, 1941, the Defendants became satisfied after due inspections as to the sufficiency of the equipment, machinery and facilities of the Claimant to perform the required work and services for the manufacturing of five hundred (500) gun mounts for the Defendant and upon suggestion of the Defendant to its duly authorized agents and after the investigations aforesaid, by the Defendant, the Plaintiff filed on April 19, 1941 a proposal in detail for the manufacture and delivery of said five hundred (500) gun mounts with the United States Navy Department, proposing to manufacture said gun mounts under plans and specifications furnished by the Defendant under all required guarantees for the protection of said Defendant and including the assumption of all financial risk and responsibility by Claimant through its own fiscal agencies and without loans or other forms of financial assistance from Defendant either for operation or plant expansion.

5. Claimant further shows that following its conferences with the Navy Planning Board, which occurred on January 3, 1941, as heretofore alleged, it began actively to make its plans with a view to submitting a proposal for work to be done at its plant for the Defendant; that from time to time, upon inspections made of its plant by agents of the Defendant from the Inspection Bureau, Naval Ordnance and from the Gun Mount Section of the United States Navy, Washington, D. C., said Claimant was told that it should put its equipment, plant and facilities in perfect condition to handle said contract as speedily as possible, that accordingly, Claimant proceeded with procurement of the necessary personnel, including engineers and technical men, and also material for said

purposes. That subsequent to filing its proposal on April 19, 1941, further detailed inspections were made.

6. That following the filing of this proposal dated April 19, 1941, the Claimant was advised by the Gun Mount Section of the Navy Department that its proposal would be favorably acted upon and that Claimant should proceed further and speedily to get itself in readiness for the prompt performance of its said proposal. That on to-wit April 26, 1941, by its duly authorized agents, Defendant advised Claimant that after due inspection, its agents had found Claimant's production methods were satisfactory; following which Claimant continued its activities to make ready for the performance of any contract awarded it under the terms of this proposal of April 19, 1941, incurring further additional expenses for engineering and the purchase of necessary material for the performance of said proposal. And Claimant considered that at all times herein referred to it had entered into a bona fide understanding with the Defendant that it should incur said expenses for personnel, engineering and materials in order to enable it to perform the terms of its said proposal.

7. That on to-wit September 25, 1941, after unreasonable delays by the Defendant's not acting upon Claimant's proposal, the Defendant requested of the Claimant through its duly authorized representatives, the filing of a written memorandum of additional data or information as to Claimant's facilities and capacity to perform its said proposal.

8. That on to-wit September 25, 1941, such memorandum was delivered to Plaintiff, copy of which is hereto attached as Exhibit No. 1 to this Petition.

9. That complying with the terms of said memorandum of September 25, 1941, Claimant, to-wit on October 7, 1941 furnished the information requested including a complete detailed study of all machine tool operations and hours involved in producing the principal parts of said five hundred (500) gun mounts, supposed to be manufactured by Claimant in its proposal of April 19, 1941.

10. That during all of the time while said discussions referred to in preceding paragraphs were in progress, the Claimant continued to pay out large sums of money for personnel, executive expenses and for engineering services and for putting in perfect condition its plant and facilities for speedy performance of the terms of its said proposal, relying upon the repeated assurances of the Defendant that Claimant would receive the contract proposed to be performed in its proposal of April 19, 1941.

11. That on November 29, 1941, Defendant presented to Claimant plans for a modified unit of the gun mounts proposed to be manufactured by Claimant with the request that Claimant revise its price in writing for said modified units; that Claimant did so on

December 13, 1941, reducing the number of the gun mounts the United States, through its duly authorized agent, proposed to be manufactured, from five hundred (500) to three hundred (300) as had been requested by agents for said Defendant, and thereafter on December 18, 1941, as rquired by law and regulations of the Navy Department, a conference was held in the Bureau of Ordnance of the United States Navy Department and in strict accordance therewith, the order was confirmed and the Bureau of Supplies and Accounts of the United States Navy Department was ordered to issue a contact as approved. Said conference was attended by the following representatives of the Defendant:

Capt. A. R. Marron
Lt. Comdr. A. E. Uehlinger
Lt. H. St. John Butler
Lt. Comdr. Parker
Ensign Smith

and that Claimant was represented at said conference by H. C. Parse, Vice President, and H. M. Johnson, Assistant to the President, of the Plaintiff corporation, said Johnson having had previous continuous charge of all actual negotiations between the Claimant and Defendant. And that as a result of said conference, and the submission of said second or modified proposal, that said officials of the Defendant duly authorized so to do, assured Claimant that it should have and would duly receive confirmation of an order to manufacture one hundred and fifty (150) of the proposed said three hundred (300) gun mounts and that the Defendant further assured Claimant that a letter of intent with regard to said work would not be necessary as the contract proper would be issued promptly without the formality of such letter of intent.

12. That following said conference, to-wit on December 24, 1941, the Defendant by its Bureau of Ordnance, United States Navy Department, in confirming the provisions and agreements of the aforesaid conference, executed and caused to be delivered to the Claimant an executed copy of an official memorandum providing that the Claimant would be given full authority in the near future to proceed with the manufacture of one hundred and fifty (150) of the three hundred (300) gun mounts covered by its proposal previously filed with the United States Navy Department, duly authorized agent of the Defendant. (Copy attached hereto and marked Exhibit No. 2.)

13. That following the receipt of the said official notification, Claimant continued to incur large expenses for engineering, material and labor in making ready for the manufacturing program of the anticipated order.

14. Claimant further shows that although they had been assured by Defendant that a letter of intent was unnecessary in Claimant's case to create a binding agreement with the Defendant, neverthe-

less on January 7, 1942, a letter of intent was received dated December 29, 1941, which letter of intent by its terms required an acceptance on or prior to January 15, 1942 by Claimant and that on January 10, 1942 said letter of intent was so accepted by Claimant. (Copy of letter of intent and acceptance thereof is hereto attached and marked as Exhibit No. 3 to this Petition), and that said letter of intent provided that Claimant should manufacure the following:

Item	*Articles required*	*Number*
1	3"/50 Caliber A. A. Mounts, Mark 22, Mod 2	150
2	Sets, Spare Parts for Vessels	75
3	Sets, Spare Parts for Tenders	10
4	Sets, Spare Parts for Shore Bases	10
5	Necessary Tools	—
6	Necessary Pattern Equipment	—

15. Claimant further shows that immediately following the receipt of the "letter of intent" (dated December 29, 1941 and received by Claimant January 7, 1942 Exhibit No. 3 hereto attached), it proceeded, with all possible speed, to perfect all necessary plans and arrangements to perform the work specified in said "letter of intent", and in so doing continued the work of procuring and obligating itself to pay for necessary engineering services, operating personnel, material required, additional equipment and machinery, thereby incurring large expenses and obligating itself for additional costs and charges against future specifications made necessary by said "letter of intent" and its acceptance by Claimant.

16. That Claimant, with the full knowledge of Defendants, through their responsible representatives, treated said "letter of intent", Exhibit No. 3 hereof, as a definite authorization to proceed to do everything necessary and to incur all reasonably necessary expense to get its plant and machinery in a state of readiness to begin actual production of the articles therein described and did so proceed and was so proceeding on to-wit February 23, 1942 when there was issued and delivered to Claimant a definite order and contract (Navy Contract No. LL96553) authorizing and directing Claimant to proceed with the manufacture of one hundred and fifty (150) gun mounts and the other items described in said "letter of intent" of December 29, 1941 (Exhibit No. 3 hereto), the Defendant by said order (Navy Contract No. LL96553) agreeing to pay Claimant therefor the sum of $2,087,555.00. Copy of said order and Contract is attached hereto as Exhibit No. 4 to this Petition.

17. That immediately following receipt of said order of February 23, 1942 and in conformity therewith, as well as with previous instructions and in line with the terms of said letter of intent of December 29, 1941 (Exhibit No. 3 hereto) and in order to expedite further the plans theretofore agreed upon between agents and

officers of Claimant and Defendant, Claimant's agents redoubled their energies and efforts to start production, in their plant at Waynesboro, Virginia, of the articles covered by their said order of February 23, 1942 (Exhibit No. 4 hereto), and concluded and finally executed agreements and arrangements for all additional engineering personnel, purchases of material and equipment, and the hiring of operating personnel, at great present and future expense, as will be hereinafter set out in detail and did and performed all requirements and activities assumed by it or contemplated by said "letter of intent" Exhibit No. 3 hereto, or said order-contract, Exhibit No. 4 hereto, of February 23, 1942 and thereby became entitled as matter of law and by the agreements herein recited to receive and recover all the amounts for charges, expenses, profits, damages and disbursements contemplated between the parties and made necessary by reason of the negotiations and agreements herein referred to.

18. That immediately subsequent to the delivery to the Claimant of the contract-order dated February 23, 1942, Exhibit No. 4 hereto, Claimant further perfected its plans for carrying out the terms and conditions of said contract, upon which it had been working under previous agreements with the Defendants and in order to do so continued to employ its engineering force and other personnel and made further plans for the delivery of the necessary material for said performance and was actively so engaged when the Defendant, without notice or warning, and without valid or legal reason or excuse, on March 9, 1942, caused to be delivered to the Claimant a certain notice from the Defendants, purportedly coming from the Bureau of Ordnance, United States Navy Department, through the office of the Inspector of Naval Material at Philadelphia, Pennsylvania, cancelling and terminating said contract, and Claimant says, upon receipt of said notice, it was also notified that its efforts to carry said contract out should be discontinued and terminated and that no further service or work should be done and Claimant says that because of said illegal, wrongful, unwarranted and unlawful action, that there was created a gross breach of contractual rights of Claimant and that it was damaged thereby and suffered losses as hereinafter fully set forth in detail:

(a) That subsequent to the above unwarranted and illegal cancellation of the contractual rights of Claimant as set forth in the preceding paragraph that the Defendants, through Lts. Malcolm Sharpe and F. B. Hatcher of the Norfolk Naval District—thereunto wrongfully directed by the Defendant—entered upon the premises of Claimant on to-wit April 22, 1942, while Plaintiff was in legal and peaceable possession of its premises, plant, equipment and machinery and forcibly and without notice to Claimant or authority to do so, proceeded to take possession of Claimant's plant and property, including all machinery and equipment therein and took from the said plant and dismantled and removed from said plant, machinery

and equipment of great value—to-wit of the value of $74,045.20, the machinery being the following:

2 Automatic Screw Machines 1⅛ and 1¼"
1 Long & Alstatter Double End Punch #3
2 Automatic Screw Machines, 1"
1 10 x 6' Niles Boring Mill
1 Turret Lathe W&S #2, Serial No. 86093
1 Turret Lathe, Wood, Hole 1"
1 Turret Lathe W&S Hole 1¾"
1 Turret Lathe W&S 1"
1 Engine Lathe 14" x 3' Hendey
1 Portable Floor Crane
1 Milling Machine, Beeker
1 F.E. Reed Turret Lathe
1 16" x 9' Lathe
1 22" x 12' Lathe
1 #3 Punch & Shear
1 10 H. P. Electric Motor
1 15 H. P. Electric Motor
1 26 H. P. Electric Motor
1 50 H. P. Electric Motor

All complete with starting equipment

The Defendant then and there took possession of the remaining machinery and equipment and supplies of Claimant and gave notice to Claimant's agent of their purpose to dismantle and remove additional machines at some subsequent date, according to the pleasure of said Defendant, through its agents and therefore, by said wrongful and unlawful acts of trespass and breach of contract damaged Claimant in the said sum of $74,045.20; and Plaintiff says that subsequent to the taking of aforesaid machinery that Defendant has paid to Plaintiff on account thereof the su mof $25,256.57 on account of said seizure.

(b) That on to-wit July 23, 1942, said Defendants through said Lt. F. B. Hatcher, United States Navy—thereunto authorized by the Defendants—entered upon possession of Claimant's plant at Waynesboro, Virginia and again proceeded to dismantle, and remove therefrom, without notice or legal authority so to do, the following machinery:

2 chain hoists
1 Perkins punch press
1 26" planer
1 shaper
1 Post drill
1 Vice for Planer

said machinery being of the fair and reasonable value of $4,850.00 and that by the wrongful and unlawful taking of said machinery that Defendant became in debted to Plaintiff in the said sum of $4,850.00; and Plaintiff says that subsequent to the taking of aforesaid machinery that Defendant has paid to

Plaintiff on account thereof the sum of $1,194.94, on account of said seizure.

(c) That on November 17, 1942, the Defendant, through Lt. Malcolm Sharpe, U. S. N. and Lt. Thomas R. Sutner, U. S. N.—thereunto authorized by the Defendant—again entered upon the premises of the Plaintiff and dismantled and removed therefrom the following valuable machinery:

1 45" x 15' New Haven Lathe

1 Double Head Bolt Threading Machine

said machinery having the reasonable value of $10,825.00; and that by the wrongful and unlawful taking of said machinery that Defendant became indebted to Plaintiff in the said sum of $10,825.00; and Plaintiff says that subsequent to the taking of aforesaid machinery that Defendant has paid to Plaintiff on account thereof the sum of $4,000.00 on account of said seizure.

19. Claimant further charges and alleges that by reason of the unlawful and wrongful cancellation of their contract of February 23, 1942, that reasonable profits on said contract amounting to $501,013.00 were lost by Plaintiff, and that the Defendant is indebted to Plaintiff for said sum by reason of said unlawful and unwarranted attempt by Defendant to cancel and abrogate said agreement; that by reason of said cancellation of said contract, in addition to the loss by requisitioning of Claimant's machinery, as set forth in the preceding paragraphs and sub-paragraphs (a), (b) and (c), that Plaintiff was damaged by reason of the taking, dismantling and deprivation of control and possession of its plant and machinery at Waynesboro, Virginia through the agents of Defendant, to the total value thereof, which over and above the machinery removed from said premises by Defendant's agents, Plaintiff says was $270,279.80.

20. Plaintiff further shows that the Defendants are further indebted to Claimant because of their wrongful and unlawful action as hereinafter set out and in accordance with the "letter of intent" delivered to Claimant by the Defendant, dated December 29, 1941, copy of which is hereto attached as Exhibit No. 3, for the following additional sums which Claimant says were reasonably incurred and within the contemplation of the parties to said "letter of intent" (Exhibit No. 3 hereto) and said contract of February 23, 1942 (Exhibit No. 4 hereto) as follows:

(a) For legal obligations, commitments and charges incurred and expended by Claimant for sales and engineering expenses growing out of attempted performance by Claimant of the agreements and contract hereinafter set out, $104,377.00.

(b) On account of payments made and obligations entered into with engineers and other personnel to comply with requirements of the Defendant in the carrying out of the terms of said

contract of February 23, 1942, LL96533, and the terms of said "letter of intent" dated December 29, 1941, in the sum of $34,000.00.

(c) That Defendants likewise, because of their wrongful and unlawful cancellation and breach of their obligations under said contract of February 23, 1942 and said "letter of intent" of December 29, 1941, became indebted to the Claimant for payments made and obligations and commitments entered into for additional machinery to equip their plant at Waynesboro, Virginia, in order to carry out the terms of said proposal and contract in the sum of $8,800.00; that growing out of said attempted cancellation by Defendants of Claimant's contract of February 22, 1942, Defendants also became indebted to Claimant for sub-contracts and commitments reasonably entered into by Claimant in the sum of $10,000.00; that by reason of said herein described unlawful actions and purported cancellation of Claimant's contract and "letter of intent" hereinabove set out, that Defendants further became indebted to Claimant for the amount expended in reconditioning Claimant's plant to comply with safety and other regulations, terms of Claimant's contract with Defendants, in the sum of $23,269.00.

21. Claimant further shows that on April 22, 1942, by order of officers of the United States Navy Department, who were then on the premises of the Claimant's plant in Waynesboro, Virginia, the complete plant, all machinery therein, equipment, material and supplies of every kind were "frozen", which said action was subsequently approved by the United States Navy Department, and/or the War Production Board, Washington, D. C., and claimant was ordered and required to discontinue the using of said plant, the sale thereof or the disposition of anything therein until said plant was released. That said "freeze order" has remained in effect from said date of April 22, 1942 to the present date thereby tying up said plant and preventing its use in any manner by said Claimant and destroying its value to Claimant, making it impossible for Claimant either to use, sell or dispose of said property or to secure any income therefrom; thereby completely destroying the value of said plant, with great damage to claimant as herein set out.

22. That because of each and all of the aforesaid items, the Defendant is indebted to Claimant in the total sum of $1,011,007.49 for which Claimant asks judgment of the Court.

WHEREFORE, Claimant prays judgment against the United States of America for the sum of $1,011,007.49 and interest thereon from November 17, 1942 until paid and for such other and further relief as to the Court may seem equitable and proper.

ROBERT H. MCNEILL,
815 15th Street, N. W.
Washington, D. C.,
Attorney for Claimant.

Exhibit No. 1 to Petition.

N. Ord. 6

IN REPLY ADDRESS
BUREAU OF ORDNANCE, NAVY DEPARTMENT
AND REFER TO NO.

NAVY DEPARTMENT
(Prōc) BUREAU OF ORDNANCE
WASHINGTON, D. C.

25 September 1941

MEMORANDUM to Mr. Johnson from Lt. Comdr. Uehlinger.

Subject: Additional information in connection with the manufacture of 3"/50 mounts.

1. The following additional information is required in order to continue discussions concerning the manufacture of 3"/50 mounts by Penn Foundry and Machinery Company.

(a) A statement of the financial setup of the company in sufficient detail to permit evaluation and investigation.

(b) Positive evidence of firm commitments between Penn Foundry and Machinery Company and the proposed subcontractors.

(c) A study of the machine tool hours and operations together with names and locations of machine tools in sufficient detail to enable a check to be made of the sufficiency of the tools involved.

(d) Proposed dates of first delivery and monthly rate of delivery.

2. The above should be predicated upon the possible award of one hundred fifty (150) 3"/50 mounts of the simplified design, *i.e.* without sights, with an option for the Government to retain the right to order one hundred (100) percent additional if the company were to meet requirements as to delivery and quality.

3. The above information will be used as a basis for further discussions and is not to be considered a commitment on the part of the Government.

A. E. UEHLINGER
Lt. Comdr., U. S. N.

U/FWS

Exhibit No. 2 to Petition.

N. Ord. 7.

IN REPLY ADDRESS
BUREAU OF ORDNANCE, NAVY DEPARTMENT
AND REFER TO NO.

NAVY DEPARTMENT
(Pr5c) BUREAU OF ORDNANCE
WASHINGTON, D. C.

S74-2 (3") Dec. 24, 1941

From: The Chief of the Bureau of Ordnance.

To: The Commandant and Superintendent, U. S. Naval Gun Factory, Washington, D. C.

Subject: Penn Foundry and Manufacturing Company, 3"/50 Caliber A.A. Mounts Mark 22 Mod. 2, Vandyke prints for manufacture of.

Reference: (a) BuOrd restr. ltr. S74-2(3") (Pr5c) of November 28, 1941, copy to NGF.

1. As indicated in reference (a), the Bureau is conducting negotiations with the Penn Foundry and Manufacturing Company, Waynesboro, Virginia, for the manufacture of one hundred fifty (150) 3"/50 caliber A.A. mounts Mark 22 Mod. 2. It is anticipated that a letter of intent will be forwarded to that company at an early date covering the manufacture of this equipment. It is requested that the Naval Gun Factory forward to the Penn Foundry and Manufacturing Company, Waynesboro, Virginia, a complete set of Vandyke prints for the manufacture of 3"/50 caliber A.A. mounts Mark 22 Mod. 2 at the earliest practicable date.

W. H. P. BLANDY
A. E. UEHLINGER
By direction

B/L WS

Copy to:
INN, Philadelphia
Penn Foundry & Mfg. Co.,
Waynesboro, Virginia.

RESTRICTED

Exhibit No. 3 to Petition.

NAVY DEPARTMENT
BUREAU OF SUPPLIES AND ACCOUNTS
Washington, D. C.
29 December 1941

LL-NOs:96553(SPC)
L4-1(10)
L4-3(46)

Sirs:

This is to confirm the advice given you that it was anticipated that the Navy Department would place with your company an order for the manufacture of one hundred fifty (150) 3"/50 caliber A. A. Mounts, Mark 22, Mod. 2, complete, together with spare parts, necessary special tools, jigs, gauges and fixtures and pattern equipment, as follows:

Item	*Articles Required*	*Number*
1.	3"/50 Caliber A. A. Mounts, Mark 22, Mod 2	150
2.	Sets, Spare Parts for Vessels	75
3.	Sets, Spare Parts for Tenders	10
4.	Sets, Spare Parts for Shore Bases	10
5.	Necessary Tools	—
6.	Necessary Pattern Equipment	—

Two (2) complete mounts are to be delivered in May, 1942, three (3) in June, 1942, and five (5) in July, 1942, and thereafter at a minimum rate of ten (10) mounts per month.

The cost of the above will be defrayed from funds appropriated and now available for use by the Navy or under authorization for the consummation of contracts.

The Secretary of the Navy finds that in the interest of National Defense it is necessary that production be not delayed awaiting the placing of the aforesaid order. You are hereby authorized to purchase materials necessary for the production of the mounts and spare parts and to proceed with the production thereof in anticipation of the placing of the order, subject to the receipt by the Purchasing Officer of notification of the items to be purchased with estimated maximum prices and confirmation by the Purchasing Officer of authorization to proceed with such purchases.

In the event that the order for the mounts and spare parts is not placed with your company prior to 1 April 1942, the Government will, upon demand made prior to 1 May 1942, reimburse you for the cost incurred by you and will assume your obligation for any commitments which you have made in this connection. Upon payment and assumption by the Government, title to such material, including rights under commitments assumed, will vest in the Government.

You will agree in connection with the purchase of materials as aforesaid that you will comply with all laws pertaining or relating to the purchase of such materials. All applicable contract clauses required by Federal Law to be incorporated in contracts for articles of the kind herein contracted for are hereby incorporated herein by reference. Your attention is invited to the National Defense clause included in later contracts.

Army-Navy Munitions Board preference rating A-1-a(1 & 5) will be assigned the equipment to be covered by this contract.

If the foregoing is acceptable to you, will you kindly so indicate on the enclosed three (3) copies of this letter and return to the Purchasing Officer on or prior to 15 January 1942, thereby constituting this letter a contract until the execution of a formal contract at which time this letter of Intent will become null and void.

Yours very truly,

RAY SPEAR
Rear Admiral SC U S N
Contracting Officer
Paymaster General of the Navy

Approved:
Forrestal
Under Secretary of the Navy

Accepted: January 10, 1942
Penn Foundry & Mfg. Co., Inc.
(Signed)
By A. F. Holliday
President
(Title)

Penn Foundry & Mfg. Co., Inc.
Waynesboro, Virginia.

Exhibit No. 4 to Petition.

N. S. A. 503
(Revised Aug. 1941)

THIS IS YOUR OFFICIAL AWARD OF
NAVY CONTRACT NOs. LL 96553

NAVY DEPARTMENT
BUREAU OF SUPPLIES AND ACCOUNTS
Washington, D. C.

RESTRICTED
NSA REQ'N 2509 23 February 1942

Sirs:

Your proposal, contained in schedule Special-Ord opened in this Bureau on Special, is hereby accepted with respect to the following material:

Lot Number	*To be Delivered*	*Remarks*
	Fob Waynesboro Va	Gun mounts Priority rating A-1-a, certificate AN-4331576 assigned to this contract

This acceptance is your authority to commence performance in accordance with the terms of your proposal without waiting for the formal contract, which will be in the amount of $2,087,555.00. If, however, the schedule requires approval of *your* plans (blueprints), you must secure such approval prior to starting production.

Pending receipt of the contract please be governed by the instructions contained in the schedule as regards specifications and inspection. Inspection will be made by Inspector of Naval Material Philadelphia Pa at the place of manufacture, unless otherwise provided in the schedule.

THE UNITED STATES OF AMERICA
M. A. NORCROSS
By G F YORAN
Purchasing Officer, Bureau of Supplies and Accounts, Navy Department.

PENN FOUNDRY & MFG CO
Waynesboro Va

GENERAL TRAVERSE—FILED JULY 31, 1944.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) FRANCIS M. SHEA,
Assistant Attorney General.

N.A.C.
E.E.E.

DEFENDANT'S COUNTERCLAIM—FILED FEBRUARY 28, 1947.

On February 28, 1947, on motion made therefore and allowed by the court, the defendant filed a counterclaim, which is as follows:

Comes now the defendant by its Assistant Attorney General, and by leave of court first had and obtained, and without waiving any

of the defenses interposed or interposable under the general traverse heretofore pleaded, files this counterclaim and alleges:

1. On or about June 26, 1943, A. H. Holliday, president of plaintiff corporation, executed a release on behalf of said plaintiff, whereby in consideration of the payment by the United States to plaintiff of the sum of $4,000.00, A. H. Holliday, purporting to act on behalf of plaintiff corporation, released the United States from all actions, claims, etc., which plaintiff might have by reason of, or in any way arising directly from the requisitioning of certain machinery by the defendant, acting through its Navy Department. This release is in evidence in this case as Defendant's Exhibit 18.

2. Defendant paid the sum of $4,000.00 to plaintiff, as consideration for said release, in reliance on representations by A. H. Holliday and other officers and representatives of plaintiff that A. H. Holliday was authorized by plaintiff corporation to execute said releases on its behalf.

3. The money so paid by defendant as consideration for said release was paid to plaintiff and received by it. The execution of the release, the payment of the money, and the receipt thereof by plaintiff, were all with the full knowledge and consent of plaintiff, its officers, and legal counsel.

4. On or about September 16, 1943, W. L. Dally, trustee under a deed of trust from plaintiff corporation, executed two releases which are in evidence in this case as Defendant's Exhibits 16 and 17, whereby in consideration of the sum of $12,628.28 and $597.47, respectively, paid to him by defendant, acting through its War Production Board and Defense Supplies Corporation, W. L. Dally, trustee, released defendant from all actions, claims, etc., by reason of, or in any way arising directly out of the requisitioning by defendant, acting through the aforementioned agencies, of certain machinery belonging to plaintiff corporation, subject to a mortgage in favor of W. L. Dally, trustee.

5. The sums of $12,628.28 and $597.47, respectively, were paid by defendant to W. L. Dally, trustee, as consideration for the two releases, in reliance on representations by W. L. Dally and other officers and representatives of plaintiff corporation that W. L. Dally was an active responsible executive officer of plaintiff corporation, authorized in his own name as trustee to act on behalf of and to bind the said corporation in the execution of the aforementioned releases.

6. The monies so paid by defendant to W. L. Dally, trustee, as consideration for said releases were by him paid over to plaintiff corporation or to its account. The execution of the releases, the payment of the monies, and the receipt thereof by plaintiff were all with the full knowledge and consent of plaintiff, its officers, and legal counsel.

7. On February 4, 1947, plaintiff, in hearings before a Commissioner of this Court, denied the validity of said releases insofar as their binding effect on plaintiff is concerned; on the grounds that said A. H. Holliday and said W. L. Dally had no power or authority to execute said releases on its behalf.

8. Plaintiff still retains all the three sums of money so paid, totalling $17,225.75, notwithstanding its denial of the validity of the three several releases in consideration of which the monies were paid. If said releases are invalid, defendant is entitled to the return by plaintiff of said sums of money.

Wherefore, defendant asks judgment against plaintiff—

a. For the sum of $17,225.75, with interest to date of judgment;
b. For its costs, as provided by law.

Respectfully submitted.

JOHN F. SONNETT,
Assistant Attorney General.

HENRY WEIHOFEN,
Attorney, Department of Justice.

ARGUMENT AND SUBMISSION OF CASE—JAN. 6, 1948.

On January 6, 1948, the case was argued and submitted on merits by Mr. David G. Bress for plaintiff, and by Mr. Henry Weihofen for defendant.

SPECIAL FINDINGS OF FACT, CONCLUSION OF LAW AND OPINION OF THE COURT BY MADDEN, J. FILED FEBRUARY 2, 1948.

Mr. David G. Bress for the plaintiff. *Mr. Robert H. McNeill, Mr. T. Bruce Fuller,* and *Newmyer & Bress* were on the briefs.

Mr. Henry Weihofen, with whom was *Mr. Acting Assistant Attorney General Herbert A. Bergson,* for the defendant.

This case having been heard by the Court of Claims, the court, upon the report of a commissioner and the evidence, makes the following:

SPECIAL FINDINGS OF FACT

1. Plaintiff is a corporation organized under the laws of the State of Virginia for the purpose of engaging in the manufacturing business, with a plant at Waynesboro, Virginia.

2. In January 1941, plaintiff's plant was idle and had been for some years. Plaintiff had previously, for a time, been engaged in the manufacture of circular saws and had done work in connection with brake shoes and some other minor work. The plant had been purchased by plaintiff in 1911. When acquired, it was equipped with certain machinery and equipment, and shortly after acquisition certain additional used machinery was acquired and placed in

the plant. The plant was actively engaged until around 1931, since which time it has been used for minor engagements only, requiring not more than four or five employees. The plant consisted of six buildings, of which three main buildings, each 57 x 100 feet, were referred to as the machine shop, the foundry, and the blacksmith shop. Among the smaller buildings was a two-story office building. The buildings were of brick and stone with metal roofs. The main buildings were built about 1890. The officers of the company in 1940 were engaged in other businesses at or near Pittsburgh, Pennsylvania, and one stockholder and director of the company was engaged in the real estate business in Waynesboro. He had been the local manager of the plant when it was in operation, and continued to be its local manager and the statutory agent for the company thereafter.

3. Late in 1940 or early in 1941 the officers of the company became desirous of engaging in the National Defense program. In January 1941 the company engaged one H. M. Johnson as assistant to the president, and, later, Gordon Kennedy, an engineer, as general manager. Mr. Johnson, in January 1941, held a conference with officials of the Navy Department with respect to plaintiff's availability to manufacture gun mounts. Mr. Johnson was active in this behalf throughout the year 1941. In April 1941 the company submitted a proposal to the Navy Department for the manufacture of 500 three-inch 50-caliber gun mounts. Prior to July 1941, plaintiff had submitted to the Navy Department a list of equipment which was owned by the plaintiff or deemed available by plaintiff's representative for the work. In July 1941 a representative of the Gun Mount Section of the Navy Department inspected plaintiff's plant and also talked to the engineer who was later to be engaged as plaintiff's general manager. A conference was held by the Bureau of Ordnance in September, following which plaintiff was asked to furnish information as to financial ability, commitments of subcontractors, and a detailed study of the machine tool operations, predicated upon a possible award of 150 three-inch 50-caliber mounts. On October 7, 1941, the company submitted additional information, and on December 13, 1941, modified slightly its previous proposals.

On December 22, 1941, a meeting was held by a representative of the Bureau of Ordnance, Navy Department, and the plaintiff, for the purpose of negotiating a contract. At this conference plaintiff's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts was accepted as satisfactory, and plaintiff's representative agreed to furnish a letter from a surety company indicating that a bond of the nature required by the Bureau of Supplies and Accounts would be furnished.

4. Thereafter the plaintiff was given a letter dated December 29, 1941, confirming the advice that it was anticipated that the Navy

Department would place an order with plaintiff for the manufacture of 150 of the gun mounts, with deliveries as follows:

> Two (2) complete mounts are to be delivered in May 1942, three (3) in June 1942, and five (5) in July 1942, and thereafter at a minimum rate of ten (10) mounts per month.

This letter contained the following paragraphs:

> The Secretary of the Navy finds that in the interest of National Defense it is necessary that production be not delayed awaiting the placing of the aforesaid order. You are hereby authorized to purchase materials necessary for the production of the mounts and spare parts and to proceed with the production thereof in anticipation of the placing of the order, subject to the receipt by the Purchasing Officer of notification of the items to be purchased with estimated maximum prices and confirmation by the Purchasing Officer of authorization to proceed with such purchases.
>
> In the event that the order for the mounts and spare parts is not placed with your company prior to 1 April 1942, the Government will, upon demand made prior to 1 May 1942, reimburse you for the cost incurred by you and will assume your obligation for any commitments which you have made in this connection. Upon payment and assumption by the Government, title to such material, including rights under commitments assumed, will vest in the Government.

The letter was signed by the Paymaster General of the Navy as contracting officer and approved by the Undersecretary of the Navy. This "letter of intent" was accepted by the plaintiff on January 10, 1942, and returned to the Navy Department. Under date of January 7, 1942, plaintiff was sent a letter as follows:

> In connection with the Letter of Intent which has been issued to you covering one hundred fifty (150) 3"/50 caliber A. A. Mounts, Mark 22, Mod. 2, it is the understanding of this Bureau that no expenditures under this Letter of Intent will be approved until such time as you furnish a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract is executed. This was the understanding reached between representatives of your company, the Bureau of Ordnance and the Bureau of Supplies and Accounts at the time this contract was negotiated in the Navy Department at Washington.
>
> Such a letter should be obtained and forwarded to this office promptly so that work may proceed under the authority of the Letter of Intent.

By a letter of January 29, 1942, the company was advised by the Navy Department that the letter from a surety company with reference to the giving of a bond had not been received and that failure promptly to submit such a letter might result in the termination of the letter of intent. On February 3, 1942, plaintiff's

representative submitted to the Navy Department a letter from a surety company with reference to the bond. The letter indicated that the surety company thought that a bond in connection with a contract of this size would have to be reinsured and that unless some change were made in the financial set-up, reinsurance would be declined, but if either of two suggested plans relative to refinancing was accomplished by plaintiff, and the plaintiff furnished certain information as to new key personnel to be engaged by the plaintiff, reinsurance could be obtained and the surety company could execute a bond. The representative of the plaintiff who presented this letter to the Department testified that the official who received it said that it was satisfactory. A witness for the Government testified that he overheard the conversation, and that it was to the effect that the letter would be considered, to determine whether it was satisfactory.

5. On January 16 and 17, 1942, plaintiff's plant was visited by inspectors of the Philadelphia Inspection District of the Navy Department to instruct plaintiff's personnel as to the Navy inspection requirements. At the time there was no one at the plant except the watchman and the local manager. No work at all was being performed at the time. On February 19, 1942, a production specialist from the War Production Board visited the plant. His duties were to assist production in factories in the production of naval ordnance. At that time only the watchman was at the plant. The production specialist inspected the plant with the local manager, who was called from his real estate office, and also talked with Mr. Johnson, who was called to Waynesboro for that purpose. Reports of these visits were given to the Navy Department. At that time the company was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts. Plaintiff's foundry was incapable of production of the cast steel forgings required for the gun mounts. It was plaintiff's plan, as shown by its proposal to the Government, to subcontract for the castings, as well as for other parts of the work. Plaintiff had contacted certain producers, who were willing to furnish castings and other parts, but no contracts for the castings or any other parts had been made by plaintiff. There was no reason to suppose that the plaintiff could not have obtained these parts from subcontractors. Plaintiff planned to use around 150 mechanics, skilled, semi-skilled, and unskilled, in the machining and assembling of the gun mounts. Plaintiff had expected to secure former railroad shop mechanics residing near Waynesboro as the bulk of its employees. The construction of gun mounts is difficult and exacting work. Manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year from the time of receiving notice to proceed until the first gun mounts were produced. Plaintiff had no manufacturing

organization and no force of trained personnel to train unskilled employees. Plaintiff's proposed general manager was at this time a regular employee of another company in Ohio. He had been assisting plaintiff in its plans under the expectation that he would sever his connection with the other company and become plaintiff's general manager. A contract between plaintiff and the engineer under the terms of which the engineer was engaged as general manager was executed on February 24, 1942.

6. Under date of February 23, 1942, the Navy Department mailed to plaintiff a notice of award of contract, No. LL96553, for gun mounts, in the amount of $2,087,555, which notice of award was received by the plaintiff on February 24, 1942. On February 24, 1942, after it had received the notice of award, plaintiff received a telegram as follows:

> NOTICE OF AWARD CONTRACT NOS 96553 FORWARDED IN ERROR RETURN FOR CANCELLATION NO AWARD TO YOU ACKNOWLEDGE REFERRING SYMBOL SPF—
>
> RAY SPEAR PAYMASTER GENERAL NAVY

On March 5, 1942, the Navy Department prepared and mailed to plaintiff a letter as follows:

> SUBJECT: Preliminary award of Contract LL-NOs-96553 for 3"/50 Caliber A. A. Mounts, Mark 22, Mod. 2.
>
> Reference: (a) Bureau of Supplies and Accounts Letter of intent LL-NOs-96553 (SPC) of 29 December 1941.
> (b) Bureau of Supplies and Accounts letter LL-NOs-96553 (SPC), L4-1 (10), L4-3 (46) of 7 January 1942.
> (c) Bureau of Supplies and Accounts Letter LL-NOs-96553 (SPC) of 29 January 1942.
>
> Sirs: By reference (a) you were advised that no expenditures under Letter of Intent LL-NOs-96553 (SPC), dated 29 December 1941, would be approved until such time as you furnished a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract should be executed. Reference (b) advised you that failure to submit promptly such a letter might result in termination of the Letter of Intent.
>
> As it is apparent that you cannot secure a bond to insure faithful performance of the contract, no contract will be issued to you, and the Letter of Intent LL-NOs-96553 (SPC, dated 29 December 1941, is hereby cancelled.
>
> Since no authority has been given you to incur any expenses under the Letter of Intent, there can be no liability on the Government by reason of the cancellation of the Letter of Intent.
>
> Please return the original and all copies of the Letter of Intent, unsigned, to the Bureau of Supplies and Accounts for cancellation.

7. Plaintiff, in 1940 and early 1941, made expenditures in connection with its endeavor to secure Navy work, such as fencing in its plant, repairing broken windows, and making certain other minor repairs to the plant proper, most of which, except the fence, were in the nature of routine maintenance. It also made expenditures and incurred obligations in connection with obtaining the services of a vice president, an assistant to the president, and an engineer, as general manager, in anticipation of getting National Defense work. The evidence does not disclose that any expenditures or expenses were incurred in reliance on the letter of intent or notice of award of contract.

8. If the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000.

9. On March 23, 1942, the War Production Board advised plaintiff, by telegram not to dispose of certain designated machine tools until further directions from the Bureau of Priorities. On April 22, 1942, the Defense Supplies Corporation, on behalf of the Government, requisitioned certain machine tools from plaintiff's plant and later fixed the fair and just compensation for such tools at $25,256.57, and 50 percent thereof, $12,628.29, was paid by the Government. On September 16, 1943, after an agreement had been reached that $25,256.57 constituted fair and just compensation, the balance of $12,628.28 was paid by the Government. On July 23, 1942, the Defense Supplies Corporation, on behalf of the Government, requisitioned certain machine tools from plaintiff's plant and later fixed the fair and just compensation for said tools at $1,194.94, and 50 percent thereof, $597.47, was paid by the Government. On September 16, 1943, after an agreement was reached that $1,194.94 constituted fair and just compensation, the balance of $597.47 was paid by the Government. On September 16, 1943, simultaneously with the two payments referred to above, two releases were signed by W. L. Dally as trustee for the plaintiff. The payments by the Government were made to W. L. Dally, who used the money on behalf of plaintiff. At the time of these two requisitions, W. L. Dally was trustee under a deed of trust executed by plaintiff to secure the payment of a bond. The deed of trust was executed on April 20, 1942, and it recited as one condition that if the corporation sold any of the property, the entire proceeds would be paid to the trustee, and in the event any of the property covered by the deed of trust was taken by eminent domain, the trustee would collect and receipt for all money payable for the property so taken. Plaintiff, by its counsel, on February 17, 1943, requested that the 50-percent payments for the property requisitioned in April 1942 be paid to W. L. Dally, trustee. Plaintiff, by its assistant to the president, on March 8, 1943, made a similar request with respect to the 50 percent of the award for the property requisitioned in July 1942. Both 50-percent payments were made to W. L. Dally, trustee. The

two releases signed by W. L. Dally, trustee, released and discharged the Government "of and from all * * * claims and demands whatsoever, in law or in equity * * * in any way arising directly from the requisitioning of" the property, without in any way affecting "the signatory's rights as to other claims against the Government * * *".

On November 15, 1942, the Navy Department requisitioned certain machine tools from plaintiff's plant and later fixed $4,000 as the fair and just compensation for the property requisitioned. The $4,000 was paid to plaintiff on June 26, 1943, on which date the plaintiff accepted said amount in full and complete settlement of its claim for compensation and released the United States from any and all claims arising from or in connection with the requisitioning of the property. This release was signed by plaintiff's president pursuant to authority of a resolution of the board of directors and after the bond secured by the deed of trust of April 20, 1942, was paid and released.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover $80,000.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of eighty thousand dollars ($80,000).

OPINION

MADDEN, *Judge*, delivered the opinion of the Court.

The plaintiff is a Virginia Corporation whose principal stockholders reside in or near Pittsburgh, Pennsylvania. It has, since its incorporation in 1911, owned a manufacturing plant at Waynesboro, Virginia, consisting of six brick and stone buildings, with metal roofs, located on about six acres of ground. In 1940 the plant contained numerous large and small machine tools and accessories, which had been used very little since their acquisition by the plaintiff, but had not deteriorated to any considerable extent. The plant had been idle for some years before 1940.

Late in 1940 or early in 1941 it occurred to the officers of the plaintiff that their plant and equipment might be put to profitable use in manufacturing products for national defense. H. M. Johnson, Assistant to the President of the plaintiff company, began discussions with purchasing officials of the Navy Department with a view to obtaining a contract. In April 1941, the company submitted to the Navy a proposal for the manufacture of 500 three-inch 50-caliber anti-aircraft gun mounts. It furnished a list of equipment which it had or could obtain for the work. In July a Navy Inspector inspected the plant and talked to Mr. Gordon Kennedy, the engineer

who was later to become the plaintiff's general manager. A conference was held in September, in the Navy Department, and thereafter the plaintiff was asked to furnish further information, including a detailed study of the machine-tool operations which it would use if it were awarded a contract for 150 of the gun mounts. It furnished the study, and modified slightly its previous proposals. On December 22, 1941, a meeting of representatives of the plaintiff and of the Bureaus of Ordnance and of Supplies and Accounts was held in the Navy Department, at which meeting the plaintiff's proposal was discussed and was said to be satisfactory. The plaintiff's representative was asked if it would be satisfactory for the plaintiff to endeavor to obtain a letter from a bonding company saying that it would be willing to furnish a bond to secure the performance of the contract, and replied affirmatively.

On December 29, 1941, the "letter of intent" to give the plaintiff a contract in due course, parts of which letter are quoted in Finding 4, was written. This letter was accepted by the plaintiff and returned to the Department on January 10, 1942. By a letter dated January 7, the plaintiff was advised that no expenditures under the letter of intent would be approved until the plaintiff had furnished a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract should be executed. The letter asked that the plaintiff furnish the bonding company commitment promptly "so that work may proceed under the authority of the letter of intent." On January 29, the plaintiff was advised by letter that it had not furnished the bonding company commitment, and that failure to do so promptly might result in the termination of the letter of intent. On February 3, the plaintiff's representative submitted to the Department a letter from a surety company saying that it would be willing to write a bond if the plaintiff's financial structure were changed in either one of two ways which were stated in the letter. The Navy Department official to whom the letter was submitted told the plaintiff's representative either that the letter was satisfactory, as testified by the plaintiff's representative, or that the letter would be taken under consideration to determine whether it was adequate, as testified by another Department official who was sitting in the same room and testified that he heard the conversation.

On February 23, 1942, the Department mailed to the plaintiff a writing, the first lines of which said in capital letters "THIS IS YOUR OFFICIAL AWARD OF NAVY CONTRACT NO. LL 96553." The tenor of the paper, which is plaintiff's exhibit 9, is that it was a final award of a contract pursuant to the plaintiff's proposal. This writing was received by the plaintiff at Waynesboro in the forenoon of February 24. Later on that day the plaintiff received a telegram from the Department, which we have quoted in

Finding 6, saying that the award had been forwarded in error and should be returned for cancellation.

The events recited above raise the question whether or not the Government made a contract with the plaintiff. The Government urges that the apparent closing of the contract was a nullity, because it was done by mistake. The asserted mistake was made somewhat as follows. When the letter of intent was issued on December 29, 1941, that, under Department procedure, set in motion a series of steps which would, in due course, result in the mailing of a notice of award, unless the procedure was interrupted, which it was not in this case. In the meantime, the officials who had discretion as to whether or not it would be prudent to award a contract to the plaintiff were still in doubt, and continued to ponder the question, along with the many other questions involved in their day-to-day work. They did not reach their conclusion, which was that the contract should not be awarded, until the day after the letter awarding the contract had been mailed. They then tried to make their conclusion effective by sending the telegram of February 24.

We think that the Government made a contract with the plaintiff, and that no mistake of the kind which would vitiate a contract occurred. When the responsible officials directed their subordinates to prepare and mail to the plaintiff an acceptance of its proposal, as they did when they set the departmental procedure in motion to that end, they made no mistake. They did it after their conference of December 22 at which the plaintiff's proposal had been fully considered, and at which time they were aware of what the plaintiff had in the way of plant, equipment, management, and prospects for a labor force. There may have been many reasons why the proposal should not have been accepted, but they had had a full opportunity to investigate those reasons, and they still wished to accept it. The slow but apparently normal progress from the letter of intent on December 29 to the notice of award on February 23 gave them plenty of time to change their minds, and head off the award. They did change their minds, and by February 24 they were no longer willing to contract with the plaintiff. But the Government had already contracted with the plaintiff. Immediately thereafter, it regretted its contract, not because of any mistake as to any fact, but because, upon a more mature consideration of all the facts, the officials of the Department thought it would have been wiser not to have made the contract. There must, however, come a time when deliberations as to whether or not to make a contract ends, and the rights and obligations of the contract itself, if one is made, begin.

The Government's contention that the plaintiff's failure to furnish a letter from a bonding company expressing a willingness to write a performance bond, if requested, was a justification for cancelling the contract, is not valid. When the plaintiff's representative on

February 3 submitted the bonding company letter to the same Navy official who later signed the notice of award, there was no legal requirement of a bond, when a contract was not let on bids, and it was natural for the plaintiff to suppose, from the fact that the official received the letter and made no further request of the plaintiff for a bond or a firmer commitment, that nothing further was expected of it. There was no legal reason why the contract could not be awarded, without any further steps in regard to a bond, and, as we have seen, it was awarded. Indeed, the Government's witnesses testified that the question of the bond was not the real reason for the cancellation of the contract, although it was represented in the Government's letter of March 5, quoted in Finding 6, as the only reason.

We have concluded above that the plaintiff had a contract with the Government. There is no question about the Government's breach of the contract, by refusing to permit the plaintiff to perform it. The plaintiff is, therefore, entitled to recover its damages, if any resulted from the breach. The Government urges that there were none; that the plaintiff could not have performed the contract at all, and certainly not with such efficiency as to have made a profit.

In any case of a breach of a contract the performance of which would require a long succession of activities over a considerable period of time, it is far from certain that the contractor would have made a profit if he had been permitted to perform. It could be pointed out that many contractors have, by reason of accidents, changed conditions, inflation, or other eventualities, lost money on contracts from which they hoped to profit. Yet that does not prevent courts from awarding damages for breach of such contracts, nor compel courts to suppose that loss is as probable as gain in the performance of contracts. We should, therefore, if this were the case of a company undertaking to supply its normal product, award it its normal profit as damages. Here, however, the plaintiff was venturing into an untried field, as, indeed, the Government in its emergency desired companies which had idle plant and machines to do. Its production manager, Kennedy, who was highly thought of by the Government for his experience and ability, was willing to come with the plaintiff at a rather modest salary but with an arrangement whereby he was to have a percentage of the profits. This is substantial evidence that one expert who had studied the situation carefully anticipated that the performance would produce profits. The stockholders of the plaintiff, who were willing to finance performance without asking for any advance funds from the Navy, must have anticipated that the contract would produce a profit. We think that the consideration and tolerance with which the Government, during the time here in question, treated contractors actually engaged in producing defense material, if the contractor in good faith did his best to perform, is an indication that the

plaintiff, if allowed to perform, would probably have succeeded in making a profit.

On the other hand, it must be said that the plaintiff would have had problems and difficulties that an active, going concern would not have had, and those difficulties would probably have adversely affected its profits. On the whole we can do only what a jury would do in a similar case. We conclude that the plaintiff would probably have made net profits of about 4% of the gross contract price, and we award it $80,000.

The expenses incurred by the plaintiff in repairing its buildings, fencing its property, negotiating with the Navy Department with a view to obtaining a contract, or for other purposes are not recoverable. Until the letter of intent was issued on December 29, 1941, there was no possible reason why the Government should have been responsible for any of the plaintiff's expenditures. On January 7, 1942, the plaintiff was advised that the Government would not be responsible for any expense incurred pursuant to the letter of intent without first securing permission from the Government to make the expenditure. So short an interval elapsed between the award of the contract and its cancellation that no expense was incurred during that time.

We find no merit in that part of the plaintiff's claim relating to the taking of its machines by the Government. An offer was made for them; the plaintiff rejected the offer and accepted one-half the offered amount, preserving its rights, as the statute permitted it to do, to sue for the balance of what it claimed to be the value of the machines. 55 Stat. 742, as amended; 50 U. S. C: (Supp. V) War Appendix, Section 721. Many months later, the plaintiff itself offered to accept the balance of the amount originally offered, and to give a release upon payment. This was done. The money was paid to and retained or used by the plaintiff. The circumstances in no way suggest duress, and the plaintiff is bound by its release.

The plaintiff is entitled to recover $80,000. It is so ordered.

Howell, *Judge;* Whitaker, *Judge;* Littleton, *Judge;* and Jones, *Chief Justice,* concur.

JUDGMENT OF THE COURT, FEB. 2, 1948.

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover $80,000.

IT IS THEREFORE ADJUDGED AND ORDERED that the plaintiff recover of and from the United States the sum of eighty thousand dollars ($80,000).

PROCEEDINGS AFTER ENTRY OF JUDGMENT.

On May 3, 1948, the defendant filed a motion for a new trial.

On June 1, 1948, the court entered the following order on said motion:

ORDER.

IT IS ORDERED this first day of June, 1948, that said motion be, and the same is, overruled.

Clerk's Certificate to foregoing transcript omitted in printing.

☆ U. S. Government Printing Office, 1948 J 505204/115

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

814412—48